APR 1 1955
HAROLD B. WILLEY, C

No. 637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

F. R. PELLICER, individually on behalf of himself as an employee of Railway Express Agency, Inc., a corporation, and representatively on behalf of similarly situated employees of Railway Express Agency, Inc., a corporation, *Petitioner*,

v.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, a voluntary unincorporated labor organization, RAILWAY EXPRESS AGENCY, INC., a corporation, and SILAS McKINNEY, individually as an employee of Railway Express Agency, Inc., a corporation, and as representative of similarly situated employees of Railway Express Agency, Inc., a corporation, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AND SILAS McKINNEY

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Dated: April 1, 1955

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR THE BROTHERHOOD RESPONDENTS AND SILAS McKINNEY

OPINIONS BELOW

The opinion of the District Court (R. 71-79) is reported at 118 F. Supp. 254. The opinion of the Court ofAppeals for the Fifth Circuit (App. A of Petition) is reported in 217 F. 2d 205.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

In the absence of fraud, bad faith, or hostile or invidious discrimination, does the Railway Labor Act or the Fifth Amendment of the United States Constitution prohibit a carrier and a statutory collective bargaining representative from making an agreement conferring seniority rights on members of a craft or class who had not previously possessed them, to the relative detriment of other members of the craft or class who had theretofore enjoyed exclusive seniority benefits?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The pertinent provisions of the United States Constitution and of the Railway Labor Act involved are set forth in the Petition at p. 3.

STATEMENT

This litigation began as a suit to permanently enjoin the performance of an agreement entered into in 1952 between the respondent Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (Brotherhood) and respondent Railway Express Agency, Inc. (Railway Express) to accord seniority status with Railway Express to respondent Silas McKinney and the other colored employees of that company at Jacksonville, Florida, represented by the Brotherhood who had not therefore possessed any seniority rights. (R. 10-26)[1] The agreement provided that the names of the colored em-

[1] The suit was originally brought in a Florida State Court, but on petition of respondents was removed to the United States District Court for the Southern District of Florida. (R. 5-9)

ployees should be incorporated on the next Jacksonville Division Seniority roster of Railway Express to be published and should be integrated or "dovetailed" into the existing seniority roster which up to that time had contained only the names of white employees of the express agency. (R. 18, 19) The results of this agreement are shown by comparison of the January, 1952, seniority roster of the Jacksonville Division (R. 28-37), showing only the names of white employees, with the January, 1953, roster containing asterisks added by petitioner to indicate the names of colored employees who were integrated. (R. 38-62) The agreement was executed by Railway Express and the Brotherhood as the collective bargaining representative under the Railway Labor Act (45 U.S.C., Section 151 et seq.), for the craft or class of employees of Railway Express which includes the petitioner and the group of employees he purports to represent and the individual respondent Silas McKinney and those other employees for whom he was sued as a representative. Petitioner's complaint asserted that the agreement was contrary to the due process requirements of the Fifth Amendment to the United States Constitution and in violation of the requirements of the Railway Labor Act in that the Brotherhood had discriminated against petitioner and the other white employees of Railway Express at Jacksonville in providing for the new integrated seniority roster. The complaint did not allege fraud or bad faith by the Brotherhood in executing the agreement. 118 F. Supp. 254, 257.

The respondents and Railway Express moved to dismiss the complaint for failure to state a claim upon which relief could be granted. (R. 63-66) The District Court granted the motions, (R. 66, 67), 118 F. Supp. 254. In so doing the Court rejected petitioner's claim that a collective bargaining representative under the Railway Labor Act must treat equally in a mechanical fashion, all members of a craft whom it represents in the absence of fraud or bad faith. The Court further found that the agreement involved appeared on the face of the complaint and attached

exhibits "to be a good faith effort on the part of the Brotherhood and Express Company to comply with pronouncements of the Supreme Court in the racial discrimination cases," (R. 77), 118 F. Supp. 254, 257. The Court of Appeals for the Fifth Circuit affirmed the District Court action. 217 F. 2d 205.

ARGUMENT

Petitioner bases his application for a writ of certiorari on the ground that the Court of Appeals for the Fifth Circuit has decided an important question of Federal law in a way which is in conflict with the decision of this Court in *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (Pet. 6). It is argued that the *Steele* decision requires a collective bargaining agreement to be so framed as to extend to and embrace with absolute equality all employees in like circumstances and conditions or who are identical in their interest and merit regardless of the good faith or honesty of purpose of the collective barganing representative. However, we believe it clear that the *Steele* case outlaws only hostile discriminations negotiated in bad faith and based on considerations of an invidious nature, or contravening sound public policy. This interpretation is underscored by the decision in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) which permits the collective bargaining representative a broad range of discretion in negotiating agreements affecting seniority so long as such representative acts in good faith and the result is not contrary to public policy. The agreement here involved clearly meets such a test since its purpose is to remove existing inequalities and to place negro members of the craft on an equal footing with white members. The attempt of petitioner to use the *Steele* case to defeat this result distorts the real significance of that decision which is that a collective barganing representative should act for minority members of the craft fairly, impartially, and without hostile discrimination. That is precisely what the Brotherhood has done in this case.

The agreement is also consistent with a long line of judicial precedents upholding the validity of collective

bargaining agreements which change previously existing seniority rights. *System Federation No. 59* v. *Louisiana & A. Ry. Co.*, 119 F. 2d 509 (C.A. 5, 1941), cert. den. 314 U.S. 656; *Hartley* v. *Brotherhood of Railway & Steamship Clerks*, 283 Mich. 201, 277, N.W. 885 (1938); *Walker* v. *Pennsylvania Reading Seashore Lines*, 142 N.J. Eq. 588, 61 A. 2d 453 (1948); *Edelstein* v. *Duluth, Miscabe & Iron Range Ry. Co.*, 226 Minn. 508, 31 N.W. 2d 465 (1948); *Donovan* v. *Travers*, 285 Mass. 167, 188 N.E. 705 (1934); *Aden* v. *Louisville & N. R. Co.*, 276 S.W. 511 (1921).

Petitioner suggests that neither the allegations of the complaint nor any reasonable inference therefrom supports the conclusion that the agreement involved was executed to correct past inequalities between colored and white members of the craft involved and that such a fact is *de hors* the record. (Pet. 6, 7). However, the complaint clearly shows that prior to January, 1953 no colored employees of Railway Express on its Jacksonville Division had ever been accorded seniority rights. (R. 18, 19, 28-37, 38-62) The effect of the agreement in removing this inequality and carrying out the public policy against racial discrimination is supported by the record (R. 38-62).

Petitioner further suggests that past inequalities affecting colored members of the craft are not chargeable to him and that the proper procedure for their removal was a grievance proceeding before the National Railroad Adjustment Board. (Pet. 7) Petitioner's fault or lack of fault in the matter is irrelevant. Moreover, the complaint alleges that the colored members of the Brotherhood did not have any seniority rights under any agreement prior to 1953 (R. 18). This refutes petitioner's suggestion that the absence of such rights arose out of an interpretation or application of the existing agreement. But even if, assuming *arguendo* that the inequalities in the position of colored members of the craft could have been eliminated by a resort to grievance procedures, this fact would not prevent the Brotherhood in good faith directly removing such inequalities by amending the collective bargaining agreement.

CONCLUSION

The decision below is clearly correct, there is no conflict in decisions, and the petition raises no new issue of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1, 1955

Certificate of Service

This is to certify that the foregoing brief of the Brotherhood respondent and Silas McKinney in opposition to a petition for a writ of certiorari in Case No. 637 has been served upon the petitioner by depositing three (3) copies thereof in a United States postoffice, with air mail postage prepaid, addressed to counsel of record for petitioner, Mr. Martin J. Pearl at his address, 204 Smith Building, Jacksonville 2, Florida.

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